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6 Attorneys for Defendant

7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF ARIZONA**

9 United States of America,

10 Plaintiff,

11 v.
12 Abdul Malik Abdul Kareem,

13 Defendant.

14 2:15-cr-00707-SRB

15 **RESPONSE TO DEFENDANT'S**
16 **MOTION TO DISMISS**
17 **COUNSEL**

18 Defendant/Appellant, Abdul Malik Abdul Kareem (“Abdul Kareem”) filed a
19 Motion to Dismiss his appellate attorneys, Daniel Drake (“Drake”) and Daniel Maynard
20 (“Maynard”) on January 3, 2019 and March 11, 2019 in the United States Court of
21 Appeals for the Ninth Circuit and a Motion to Dismiss Counsel on January 2, 2019 in
22 the United States District Court for the District of Arizona and a Motion to Appoint
23 Counsel on March 25, 2019 in the United States District Court for the District of
24 Arizona. On March 20, 2019, the Ninth Circuit Court of Appeals ordered that counsel
25 shall confer with Abdul Kareem and file a response to the January 3 and March 11,
26 2019 pro se motions by April 10, 2019. On April 2, 2019, the District Court ordered
27 that counsel file the same response to Abdul Kareem’s March 11, 2019 Motion to
28 Appoint Counsel that they file with the Ninth Circuit Court of Appeals. Drake and

1 Maynard file this Response to Abdul Kareem's Motions pursuant to the Courts' Orders,
 2 which is supported by the attached Memorandum of Points and Authorities.

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 **A. Background**

5 On June 3, 2015, Elton Simpson ("Simpson") and Nadir Soofi ("Soofi") stopped
 6 their car outside of the Curtis Culwell Center in Garland, Texas, where a Draw
 7 Mohammed contest was being held and began shooting with assault rifles. Both were
 8 killed. ("Garland attack")

9 On June 10, 2015, a federal grand jury returned an indictment charging Abdul
 10 Kareem in three counts that arose out of the Garland attack alleging he was a co-
 11 conspirator with Simpson and Soofi. (CR 1, 4 ER 518)¹ Maynard was appointed to
 12 represent Abdul Kareem. A superceding indictment adding a Felon in Possession of
 13 Firearm was retuned on September 1, 2015 (CR 57, 4 ER 510) and on December 22,
 14 2015, the grand jury returned a second-superceding indictment adding Count 5 charging
 15 Conspiracy to Provide Material Support to a Foreign Terrorist Organization. Twice
 16 before the trial started, Abdul Kareem sought new trial counsel but each time he
 17 withdrew his motion to dismiss.

18 A jury trial began on February 16, 2016 (CR 209, 6 ER 789) and concluded with
 19 guilty verdicts on March 17, 2016 (CR 276, 6 ER 795). Maynard represented him in

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 25 1 The abbreviation "CR" refers to the Clerk's Record and will be followed by
 26 the pertinent document number. The abbreviation "RT" refers to the Reporter's
 27 Transcript, and will be preceded by the date of the proceeding and followed by the
 28 pertinent page(s). The abbreviation "ER" refers to the Excerpts of Record, which is in
 multiple volumes, and will be preceded by the volume number and followed by the
 relevant page number and was filed with Defendant/Appellant's Opening Brief.

1 the trial.

2 On March 31, 2016, Abdul Kareem, through Maynard, filed a motion for a new
3 trial based on prosecutorial misconduct for failure to timely disclose information, filing
4 late exhibits in violation of the Court's Scheduling Order and *Brady* violations. (CR
5 303, 2 ER 129) On July 22, 2016, the Government revealed it would be disclosing
6 additional information and the District Court took the motion under advisement pending
7 further notice from the parties. (7/22/16 RT 8-9, 5 ER 769-70)

8 On November 9, 2016, Abdul Kareem filed a supplement to the motion for a
9 new trial including material disclosed by the Government after the trial was over (CR
10 432, 2 ER 43) and a Supplemental Reply Brief on December 16, 2016 with new
11 disclosure that the Government made on November 17, 2016. (CR 452, 2 ER 27)

12 On January 11, 2017, the District Court denied Abdul Kareem's motion for
13 judgment of acquittal and his motion for a new trial and amended that order on January
14 23, 2017 (CR 469, 1 ER 13) Abdul Kareem was sentenced on February 8, 2017 (2/8/17
15 RT 49-50, 5 ER 73-74) and an amended judgment was entered on February 17, 2017.
16 On February 22, 2017, Abdul Kareem filed his notice of appeal from the amended
17 judgment (CR 491, 1 ER 1) Maynard was appointed to handle the appeal and he
18 requested Drake, a retired assistant U.S. Attorney, who now specializes in criminal
19 appeals in federal cases to join him as co-counsel to add a new set of eyes and
20 prospective to the appeal.

21 Abdul Kareem's Opening Brief was filed on December 20, 2017. The
22 Government filed a cross-appeal and it filed its Principal and Response Brief on March
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1 19, 2018. In the meantime, a case involving the attack in Garland, Texas was brought
2 by the Government in the United States District Court in Ohio (“the Ohio case”) and an
3 FBI agent who was a witness to the Garland attack testified in the Ohio case. This FBI
4 agent had not been disclosed by the Government to Abdul Kareem’s counsel until after
5 the conclusion of Abdul Kareem’s District Court trial even though he had been an eye-
6 witness to the Garland attack.

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8 Abdul Kareem, through Drake and Maynard, filed a motion for a new trial on
9 June 13, 2018 in the District Court based upon newly discovered evidence that they
10 received from the Ohio case. On June 14, 2018, Abdul Kareem, through Drake and
11 Maynard, filed a motion to stay the appellate proceedings. (CA Doc. 55)

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13 On June 21, 2018, the Appellate Court granted the motion and entered a stay of
14 appellate proceedings until September 17, 2018. (CA Doc. 56) The stay was extended
15 until December 17, 2018 (CA Doc. 58) and Abdul Kareem filed a third motion to
16 extend the stay (CA Doc. 59) which was granted on March 20, 2019 (CA Doc. 66).

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18 On January 2, 2019, Abdul Kareem filed a motion to dismiss counsel in the
19 District Court (CA Doc. 60) and the same motion to dismiss was filed in the Ninth
20 Circuit Court of Appeals on January 3, 2019. Counsel met with Abdul Kareem on
21 February 19, 2019 at FCI Florence in Florence, Colorado. Counsel attempted to answer
22 all of Abdul Kareem’s questions and alleviate his concerns. At the end of the meeting,
23 Abdul Kareem adopted and signed a statement that he wished to withdraw his motion to
24 dismiss counsel which was filed in the District Court (DC Doc. 532) and on February
25 25, 2019, the District Court ordered the motion to dismiss counsel withdrawn. (DC
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1 Doc. 533) On March 2, 2019, Abdul Kareem, through undersigned counsel, filed his
2 Fourth Motion to Extend Stay of Briefing. On March 11, 2019, Abdul Kareem filed a
3 new motion to dismiss his counsel before the Ninth Court of Appeals (CA Doc. 63) and
4 on March 25, 2019, Abdul Kareem filed a Motion to Appoint Counsel in the District
5 Court (DC Doc. 538).

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7 Abdul Kareem's Fourth Motion to Extend Stay of Briefing accurately and
8 efficiently sets out the reasons for a stay. On March 27, 2019, the District Court denied
9 Abdul Kareem's Motion to Compel Disclosures of Information from the Government.
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11 By letter of March 15, 2019, the Government, for the first time, disclosed
12 information that it had in its possession before Abdul Kareem's trial, including videos
13 from a pole camera focused on Simpson and Soofi's apartment, the two individuals who
14 conducted the Garland attack. That camera was put in place and activated before the
15 Garland attack. That fact was never disclosed nor were any of the videos it captured.
16 Nor was information in the Government's possession regarding a potential witness,
17 Sabir Nurse's ("Nurse"). At trial, it was disclosed that Simpson gave Nurse his car to
18 pay him back for money Nurse gave to Simpson which counsel argued at trial was
19 money to fund the Garland attack. Nurse's cellphone was copied by the Government in
20 September 2015 and this was not disclosed to Abdul Kareem's counsel until 2019. The
21 new discovery contains text communications between Nurse and Simpson in the days
22 leading up to the Garland attack. No communications with Abdul Kareem were
23 documented during that time, although in the flurry of activities after the attack was
24 foiled and the attackers identified, Nurse was in communication with Simpson's father
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1 (starting May 4, 2015) and Simpson's brother, Dunston; a person known as Yayah, a
2 potential witness included in the pre-appeal motion for new trial (on May 5, 2015);
3 Khalid Bell, another potential witness included in the pre-appeal new trial motion (on
4 May 4, 2015); but not Abdul Kareem. Nurse was the individual that Abdul Kareem's
5 counsel argued at trial had funded the Garland attack, rather than Abdul Kareem, as
6 argued by the Government. Drake and Maynard are in the process of reviewing the
7 newly disclosed material and will seek additional information that the Government
8 must have that has not been disclosed based upon these new disclosures. For example,
9 there must be reports by the FBI that were prepared before authorizing the pole camera
10 outside of Simpson and Soofi's apartment and there must be reports done by the FBI
11 after it was taken down along with footage after May 3, 2015.
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14 Additionally, there must be reports that authorized the Government to download
15 Nurse's cellphone that included his address book, history of phone calls and copies of
16 his text messages and the investigation the FBI did after the download. At trial, FBI
17 Case Agent Whitson testified that he was not aware of any further investigations done
18 of Nurse other than those that had been disclosed and that is now shown to be
19 inaccurate. The Government should have turned over this material before Abdul
20 Kareem's trial so that his counsel could have used it in planning Abdul Kareem's
21 defenses. It certainly shows that Nurse had contacts with Bell and Yayah after the
22 attack but not Abdul Kareem thus demonstrating that Abdul Kareem was not associated
23 with Nurse. This information shows the greater importance of Nurse's, Bell's, and
24 Yayah's testimony.
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1 **B. Right to Counsel**

2 The Sixth Amendment provides the right to counsel in all federal criminal
3 prosecutions in which the defendant is accused of a felony. *Johnson v. Zerbst*, 304 U.S.
4 458, 467 (1938). An indigent defendant has an absolutely right to counsel appointed by
5 the court. *Johnson*, 304 U.S. at 463 and the right to counsel appointed on appeal if the
6 appeal is granted as of right. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985).

7 A court may restrict the defendant's right to counsel under certain situations. A
8 lawyer wants his/her client to have confidence in him or her and there needs to be open
9 and candid communications. In this case, Abdul Kareem is obviously frustrated by the
10 process and by the fact that over two years after his trial is completed, his attorneys are
11 learning for the first time about information in the possession of the Government that
12 has not been disclosed, *i.e.*, footage from a pole camera outside of Simpson's residence
13 and information from Nurse's cellphone concerning communications with Simpson,
14 Soofi and other potential witnesses prior to and right after the Garland attack.
15 Certainly, there are FBI reports that explain the placement of the pole camera and the
16 search of Nurse's phone that have not been disclosed.

17 Undersigned counsel want to have the confidence of Abdul Kareem in the work
18 they are doing, and they have attempted to keep him informed of what they are doing
19 on his behalf. There is a great deal of additional work that needs to be done both before
20 the District Court to pursue a new trial and if that is denied then to appeal Abdul
21 Kareem's conviction.

1 Undersigned counsel does not want to add to Abdul Kareem's frustration but
 2 they do not wish to be removed from the case either. They believe it is in Abdul
 3 Kareem's best interest for them to stay involved in the District Court matter and on the
 4 appeal. They are both conversant with the trial record and the record on appeal. It
 5 would be highly inefficient for new counsel to undertake representation of Abdul
 6 Kareem at this point and redo all the work that has been done by undersigned counsel.
 7 *See, e.g., U.S. v. Mota-Santana*, 391 F.3d 42, 48 (1st Cir. 2004) (right to counsel not
 8 violated by denial of Defendant's request for substitution because work of counsel was
 9 "practically at an end."); *U.S. v. Robinson*, 662 F.3d 1028, 1032 (8th Cir. 2011)(right to
 10 counsel not violated by denial of Defendant's motion for continuance to replace counsel
 11 because of delay and inefficiency concerns). Undersigned counsel believes it would
 12 take new counsel at least a year or 18 months, putting other matters aside, to come up to
 13 speed on the current record in this matter.

14
 15 Several circuits have relied on three factors when deciding a motion to substitute
 16 counsel: (1) the timeliness of the motions; (2) the adequacy of the trial court's inquiry
 17 into the defendant's complaint; and (3) the extent of the conflict between the defendant
 18 and counsel. *U.S. v. Shea*, 493 F.3d 1110, 1119 (9th Cir. 2007)(court properly denied
 19 motion to substitute counsel because motion made midtrial and defendant had
 20 communicated with attorney).

21
 22 In the present case, the relationship between Abdul Kareem and his lawyers is
 23 not good. Undersigned counsel both spoke to Abdul Kareem in Florence, Colorado on
 24 February 19, 2019 and believed they had answered all of his questions and concerns

1 and he agreed to withdraw his motions to dismiss counsel. However, he refiled them
2 within a few weeks. Undersigned counsel both spoke to Abdul Kareem in a conference
3 call on April 3, 2019 and Abdul Kareem claimed he had lost confidence in his lawyers
4 and wants new counsel even if it means his current motions and appeals would be put
5 off for a year or more. That said, the district court is in the best position to deal with
6 this issue, including hearing personally from Abdul Kareem and his lawyers. The
7 former could be done by video or conference call, should the District Court wish to
8 make that inquiry.

C. Conclusion

12 For all of the above stated reasons, the Courts should deny Abdul Kareem's
13 motion to dismiss counsel and permit undersigned counsel to finish the work they have
14 started by seeing through to completion the motion for a new trial they have filed and if
15 necessary to finish the pending appeal.

RESPECTFULLY SUBMITTED this 10th day of April, 2019.

**MAYNARD CRONIN ERICKSON
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By /s/Daniel D. Maynard

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CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2019, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to CM/ECF registrants:

AUSA Joseph E. Koehler

AUSA Kristen Brook

Additionally, a copy was served upon Mr. Abdul Kareem by first class letter, postage prepaid, at:

Abdul Malik Abdul Kareem #44126-408
FCI Florence
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PO Box 6000
Florence, CO 81226

/s/Stacey McClellan
Stacey McClellan